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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 JOHN MILLER,

7 Plaintiff,

8 v.

9 UNITED STATES OF AMERICA,

10 Defendant.

Case No. 3:17-cv-00121-MMD-WGC

ORDER

11 **I. SUMMARY**

12 Plaintiff John Miller sued Defendant the United States of America for wrongful
13 termination from his employment as a police officer with the Reno-Sparks Indian Colony
14 (“the Tribe”). Before the Court are Defendant’s motion to dismiss (“Motion”) (ECF No. 39)
15 and Plaintiff’s motion for leave to file a proposed third amended Complaint (“TAC”) (ECF No. 57).¹ Because the Court lacks subject matter jurisdiction
16 over Plaintiff’s case, and as explained below, the Court will grant Defendant’s Motion. The
17 Court will also deny Plaintiff’s Motion to Amend because his proposed TAC (ECF No. 57-
18 1) does not cure his case’s jurisdictional defects.

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20 **II. BACKGROUND**

21 Plaintiff filed a Complaint against Defendant under the Federal Tort Claims Act
22 (“FTCA”) based on allegations that he was wrongfully terminated by the Tribe. (ECF No.
23 1.) Plaintiff moved to amend his Complaint (ECF No. 24) in response to the United States’
24 motion to dismiss it (ECF No. 9). The Court denied Plaintiff’s first motion to amend without
25 prejudice because his proposed first amended Complaint (“FAC”) contained certain
26 deficiencies. (ECF No. 29 at 3-6.) The Court also granted Plaintiff leave to file a second
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28 ¹The Court has also reviewed the parties’ responses and replies (ECF Nos. 44, 51, 60, 63).

1 amended Complaint (“SAC”), and denied Defendant’s initial motion to dismiss as moot.
2 (*Id.* at 6.) Plaintiff then filed a SAC. (ECF No. 32.) Next, Defendant moved to dismiss the
3 SAC—Defendant’s Motion. (ECF No. 39.) Before the Court ruled on Defendant’s Motion,
4 Plaintiff filed the Motion to Amend. (ECF No. 57.) Plaintiff attached a proposed TAC to his
5 Motion to Amend. (ECF No. 57-1.) In opposing Plaintiff’s Motion to Amend, Defendant
6 argues, *inter alia*, that the TAC fails—to establish subject matter jurisdiction or state a
7 claim—for many of the same reasons that the SAC allegedly fails. (ECF No. 60 at 8-10.)

8 Plaintiff’s claims against Defendant change somewhat between the SAC and the
9 proposed TAC because Plaintiff obtained additional evidence of Defendant’s alleged
10 wrongdoing. In the SAC, Plaintiff alleges the following causes of action: (1) wrongful
11 termination by retaliatory discharge under the FTCA; (2) wrongful termination in bad faith
12 under the FTCA; and (3) wrongful termination/tortious discharge under the FTCA. (ECF
13 No. 32 at 10-18.) In the proposed TAC, Plaintiff alleges the same three causes of action
14 as in the SAC, plus causes of action for negligence and gross negligence under the FTCA.
15 (ECF No. 57-1 at 12-22.) The claimed reason for these additions follows.

16 The Tribe said in a termination letter that it fired Plaintiff because he submitted an
17 unemployment claim while employed by the Tribe. (ECF No. 32-8 at 2.) Plaintiff responds
18 that the Tribe wrongfully terminated him because he was the victim of identity theft—
19 someone else applied for unemployment benefits in his name. (ECF No. 57-1 at 9-11.)
20 Plaintiff further explains that he seeks to add the negligence causes of action under the
21 FTCA to his proposed TAC because he learned after filing his SAC that someone at the
22 applicable Nevada state agency called the Tribe and told them Plaintiff was the victim of
23 identity theft regarding the unemployment benefits claim after Plaintiff was fired, but while
24 he was appealing his termination. (ECF No. 57 at 2-4.)

25 Other factual elements of Plaintiff’s claims remain consistent from his Complaint
26 through his proposed TAC. Plaintiff worked for the Tribe as a police officer. (ECF No. 57-
27 1 at 3.) Plaintiff, who is white, generally alleges that he was harassed by his supervisor
28 because of his “race, sex, perceived sexual orientation, and temporary physical

1 disabilities.” (*Id.* at 8.) For example, his supervisor allegedly declined to give Plaintiff an
2 undershirt he was distributing to other officers because he was “the wrong color of skin.”
3 (*Id.*; *see also id.* at 68.) Plaintiff’s supervisor also allegedly repeatedly changed the
4 background of his computer to display a pattern made up of the logo of the “Chicago
5 L.G.P.A. Gay Officer’s Action League.” (*Id.* at 8.) Further, Plaintiff understood that he
6 would only be a probationary employee for 90 days, but his supervisor gave him an
7 untimely performance evaluation and extended that probationary period to one year
8 because Plaintiff allegedly filled out reports incorrectly. (*Id.* at 8; *see also id.* at 75-77.)

9 Plaintiff unsuccessfully tried to remedy this harassment and alleges he was fired in
10 retaliation for trying. He argues the Tribe’s citation of his application for unemployment
11 benefits that turned out to be false when it fired him was merely a pretext to conceal that
12 the Tribe was firing him in retaliation for speaking out about his mistreatment. (*Id.* at 7-11.)
13 Plaintiff complained about workplace discrimination and harassment by his supervisor to
14 the Tribe’s Chief of Police, but the Chief missed a meeting regarding Plaintiff’s complaints
15 and generally did not take them seriously. (*Id.* at 8.) Plaintiff also submitted a harassment
16 claim to a Tribal Administrator, and unsuccessfully appealed his supervisor’s decision to
17 impose an extended probationary period. (*Id.* at 8-9.) Further, Plaintiff unsuccessfully
18 appealed his termination, and alleges that the Tribe violated its own policies during the
19 termination process. (*Id.* at 9-11.)

20 **III. DISCUSSION**

21 Plaintiff sued Defendant rather than the Tribe because the Tribe manages its police
22 force through a contract with the Bureau of Indian Affairs (“BIA”) that designates Plaintiff’s
23 supervisor and the other tribal employees relevant to his claims as federal government
24 employees for the limited purpose of FTCA liability. (*Id.* at 3-4.) However, this arrangement
25 contributes to jurisdictional issues for Plaintiff that appear to leave him without a remedy
26 for his alleged wrongful termination before this Court—regardless of the merits of his
27 factual allegations. These jurisdictional issues are equally fatal to both his SAC and
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1 proposed TAC.² Thus, the Court must grant Defendant's Motion and deny Plaintiff's Motion
2 to Amend.

3 **A. LEGAL STANDARD**

4 Federal courts are courts of limited jurisdiction. See *Owen Equip. & Erection Co. v.*
5 *Kroger*, 437 U.S. 365, 374 (1978). A federal court is presumed to lack jurisdiction in a case
6 unless the contrary affirmatively appears. See *Stock West, Inc. v. Confederated Tribes of*
7 *the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). Rule
8 12(b)(1) of the Federal Rules of Civil Procedure allows defendants to seek dismissal of a
9 claim or action for a lack of subject matter jurisdiction. Although the defendant is the
10 moving party in a motion to dismiss brought under Rule 12(b)(1), the plaintiff is the party
11 invoking the court's jurisdiction. As a result, the plaintiff bears the burden of proving that
12 the case is properly in federal court. See *In re Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir.
13 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).
14 "Because subject matter jurisdiction goes to the power of the court to hear a case, it is a
15 threshold issue and may be raised at any time and by any party." *Mallard Auto. Grp., Ltd.*
16 *v. United States*, 343 F. Supp. 2d 949, 952 (D. Nev. 2004) (citing Fed. R. Civ. P. 12(b)(1)).

17 **B. ANALYSIS**

18 The Court will grant Defendant's Motion because Plaintiff's claims are barred under
19 the FTCA's discretionary function exception. The Court therefore lacks subject matter
20 jurisdiction over Plaintiff's case.

21 While Plaintiff's precise claims against Defendant have shifted during this case, his
22 core allegation was and remains that he was wrongfully terminated from his employment
23 as a tribal police officer. Further, Plaintiff sued Defendant, and would maintain suit in his
24 TAC, entirely under the FTCA.

25 The FTCA removes the United States' sovereign immunity from suits in tort for
26 "injury or loss of property, or personal injury or death caused by the negligent or wrongful
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28 ²As noted, the claims in the proposed TAC are all based on the FTCA. See discussion *supra* Section II.

1 act or omission' of federal employees acting within the scope of their employment." *Levin*
2 *v. United States*, 133 S. Ct. 1224, 1228 (2013) (quoting 28 U.S.C. § 1346(b)(1)). The result
3 of the FTCA is that the United States is liable "to the same extent as a private individual
4 under like circumstances,' § 2674, under the law of the place where the tort occurred, §
5 1346(b)(1), subject to enumerated exceptions to the immunity waiver, §§ 2680(a)-(n)." *Id.*

6 The FTCA's exceptions include—as relevant here—the discretionary function
7 exception. See 28 U.S.C. § 2680(a). Under this exception, the government is not liable
8 for:

9 "[a]ny claim based upon an act or omission of an employee of the
10 Government exercising due care, in the execution of a statute or regulation,
11 whether or not such statute or regulation be valid, **or based upon the**
12 **exercise or performance or the failure to exercise or perform a**
discretionary function or duty on the part of a federal agency or an
employee of the Government, whether or not the discretion involved
be abused."

13 *Id.* (emphasis added). There is a two-part test for determining whether the discretionary
14 function exception applies: (1) whether the challenged actions involve any element of
15 judgment or choice; and (2) whether that judgment is of the kind that the discretionary
16 function exception was designed to shield. See *United States v. Gaubert*, 499 U.S. 315,
17 322–23 (1991). If the exception applies to a plaintiff's claims, the court must dismiss them
18 for lack of jurisdiction. See *Vickers v. United States*, 228 F.3d 944, 949 (9th Cir. 2000).

19 Defendant has satisfied both parts of this test because the core decision from which
20 all of Plaintiff's claims flow was the Tribe's decision to fire Plaintiff. "[D]ecisions relating to
21 the hiring, training, and supervision of employees usually involve policy judgments of the
22 type Congress intended the discretionary function exception to shield." *Id.* at 950; see also
23 *Sydney v. United States*, 523 F.3d 1179, 1187 (10th Cir. 2008) ("A federal agency's
24 decision to terminate or request the termination of an employee involves an element of
25 choice and is the kind of decision that implicates policy concerns relating to accomplishing
26 the agency's mission. The plaintiffs' suit against the United States, however strong it may
27 be on the merits, is therefore barred by the discretionary function exception to the FTCA .
28 . ."); *Daly v. Dep't of Energy*, 741 F. Supp. 202, 206 (D. Colo. 1990) ("Employment

1 decisions are discretionary, within the meaning of the FTCA's discretionary function
2 exception. Therefore they are not reviewable by litigation under the FTCA."); *Dahlstrom v.*
3 *United States*, Case No. 16-cv-1874-RSL, 2018 WL 1046829, at *1-*2 (W.D. Wash. Feb.
4 26, 2018). Thus, the discretionary function exception to the FTCA applies here, rendering
5 the Court without jurisdiction over Plaintiff's claims.

6 Plaintiff argues the discretionary function doctrine does not apply because the
7 Tribe's discretion in deciding to fire him was constrained by mandatory BIA and Tribe
8 procedures regarding employee termination that the Tribe did not follow. (ECF No. 44 at
9 13-15.) Defendant counters that the policies Plaintiff relies on do not dictate whether
10 Plaintiff should be fired, but merely outline how the termination process should proceed.
11 (ECF No. 51 at 5-6.) Thus, Defendant argues, the discretionary function exception applies.
12 (*Id.*) The Court agrees with Defendant. Plaintiff has not pointed to any federal authority
13 indicating that the Tribe did not retain full discretion over the ultimate decision of whether
14 to fire him. See *Sydnese*, 523 F.3d at 1184 ("To overcome the discretionary function
15 exception and thus have a chance of establishing a waiver of sovereign immunity, plaintiffs
16 must show that the federal employee's discretion was limited by 'a federal statute,
17 regulation, or policy[.]'" (citation omitted, emphasis in original); see also *Big Owl v. United*
18 *States*, 961 F. Supp. 1304, 1308-09 (D.S.D. 1997) (determining that decision not to renew
19 contract of tribal teacher fell within discretionary act exception even though school board
20 did not follow the procedures outlined in its handbook); see also *Dahlstrom*, 2018 WL
21 1046829, at *2 (rejecting argument that sources including tribal employee handbook
22 sufficiently constrained discretion to waive the government's immunity from suit).

23 In sum, the Court lacks subject matter jurisdiction over Plaintiff's FTCA claims as
24 alleged in the SAC and the proposed TAC. Accordingly, the Court will grant Defendant's
25 Motion and deny Plaintiff's Motion to Amend.

26 **IV. CONCLUSION**

27 The Court notes that the parties made several arguments and cited to several cases
28 not discussed above. The Court has reviewed these arguments and cases and determines

1 that they do not warrant discussion as they do not affect the outcome of the motions before
2 the Court.

3 It is therefore ordered that Defendant's motion to dismiss (ECF No. 39) is granted.
4 Because the Court lacks subject matter jurisdiction over it, Plaintiff's case is dismissed in
5 its entirety without prejudice.

6 It is further ordered that Plaintiff's motion for leave to file a proposed third amended
7 Complaint (ECF No. 57) is denied.

8 The Clerk is directed to enter judgment in accordance with this order and close this
9 case.

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11 DATED THIS 26th day of November 2018.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE
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